No. 01-1657

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TEJPAUL S. JOGI,
Plaintiff-Appellant,

v.

TIM VOGES, RON CARPER, DAVID MADIGAN,
and JOHN PILAND,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

SUPPLEMENTAL BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

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Pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(a), the United States submits this supplemental brief as amicus curiae, in further support of the petition for rehearing or rehearing en banc. As the United States explained in its initial brief, the panel decision erred in holding that Article 36 of the Vienna Convention on Consular Relations creates an individual right to consular notification that may be enforced in a civil action for money damages. The Court has now ordered supplemental briefing on two additional questions, neither of which has been previously briefed or argued by the parties, and both of which are of substantial

importance to the United States. The United States accordingly submits this supplemental brief to address the Court's questions, as well as to urge once again that the Court grant rehearing or rehearing en banc.

QUESTIONS PRESENTED[1]

1. What, if anything, does 28 U.S.C. § 1350 add to the analysis of subject matter jurisdiction in this case, in light of the Supreme Court's holding in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that § 1350 is a jurisdictional statute, and in light of the fact that 28 U.S.C. § 1331 authorizes the district courts to exercise subject matter jurisdiction in cases arising under treaties, among other things?

2. Given the fact that the defendants in the present case are state actors, does 42 U.S.C. § 1983 provide a private right of action to assert a violation of the Vienna Convention? If so, does this make it either unnecessary or undesirable to decide whether the Vienna Convention itself gives rise to an implied private right of action, given the broader implications that attend interpretation of a treaty?

[1] The questions presented are drawn verbatim from the Court's Order of Sept. 11, 2006.

DISCUSSION

I. 28 U.S.C. § 1331 CONFERS SUBJECT-MATTER JURISDICTION OVER THE PLAINTIFF'S CLAIM, BUT DOES NOT AUTHORIZE A COURT TO RECOGNIZE A FEDERAL COMMON-LAW CLAIM FOR VIOLATION OF ARTICLE 36 OF THE VIENNA CONVENTION.

As this Court's question suggests, 28 U.S.C. § 1331 provides subject matter jurisdiction over the plaintiff's claim. As we have explained in our rehearing petition and further elaborate below, neither the Vienna Convention itself nor 42 U.S.C. § 1983 establishes a private right of action to challenge an alleged violation of Article 36 of the Convention. Nevertheless, a plaintiff's failure to state a valid claim does not generally affect a court's subject matter jurisdiction, *see Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1242–1245 (2006), unless the claim is so "plainly unsubstantial" that it falls outside of the statutory grant of jurisdiction, *Ex parte Poresky*, 290 U.S. 30, 32 (1933). Because the plaintiff's claim here is not "plainly unsubstantial," the validity of the claim has no bearing on the district court's subject matter jurisdiction under § 1331.

Because subject matter jurisdiction exists under 28 U.S.C. § 1331, there is no need for the Court to determine whether jurisdiction would also rest under 28 U.S.C. § 1350. We note, however, that there is a serious question whether the treaty

violation alleged here, involving an alleged failure of notice by government officials, constitutes a "tort" within the meaning of the Alien Tort Statute, 28 U.S.C. § 1350.

The fact that a court has subject matter jurisdiction under 28 U.S.C. § 1331 over the plaintiff's claim does not mean that the court has authority to recognize as a matter of federal common law a private right of action to enforce Article 36 of the Vienna Convention. As the panel decision correctly recognizes, the analysis in *Sosa v. Alvarez-Machain*, 524 U.S. 692 (2004), regarding federal common law's incorporation of customary international law, does not apply to claims brought under 28 U.S.C. § 1350 to vindicate rights under international treaties. *See* slip op., at 29 (distinguishing between "treaty half" of 28 U.S.C. § 1350 and "'law of nations' half," only the latter of which is subject to *Sosa* analysis for common-law claims); *see also* slip op., at 7 (noting that *Sosa*'s analysis of claims based on "laws of nations" is "of only marginal relevance" to Jogi's claim, which is brought under a treaty). Where a plaintiff seeks to vindicate rights assertedly created by a treaty, the appropriate analysis is "analogous to claims under statutes: *if there is an implied private right of action, the claimant can go forward; if not, he must rely on public enforcement measures to vindicate his rights*." Slip op., at 29 (emphasis added).

The same rule applies to claims brought under 28 U.S.C. § 1331. "The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law * * *." *Texas Indus., Inc. v. Radcliff Materials, Inc.*,

451 U.S. 630, 640-641 (1981). *Sosa* adopted a different rule for claims brought under the "law of nations" prong of 28 U.S.C. § 1350, but expressly preserved the traditional rule for claims over which a court's subject-matter jurisdiction was based on a different provision or statute. *See Sosa*, 542 U.S. at 731 n.19 ("Our position does not * * * imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes as § 1350) * * *.").

We explained in our initial brief that the Vienna Convention does not create any private right of action for civil damages to remedy violations of Article 36. Nor, as we explain below, does 42 U.S.C. § 1983 establish a private cause of action for violations of Article 36 of the Convention. Accordingly, the proper disposition of this case is a remand to the district court with instructions to dismiss for failure to state a valid claim.

II. ARTICLE 36 OF THE VIENNA CONVENTION IS NOT ENFORCEABLE UNDER 42 U.S.C. § 1983.

In order to bring a valid claim under 42 U.S.C. § 1983, a plaintiff must show both that federal law creates individual "rights, privileges, or immunities," and also that those rights are "secured by the Constitution and laws" within the meaning of that provision. As we next demonstrate, neither requirement is satisfied by a private

claim for money damages for an alleged violation of Article 36 of the Vienna Convention.

A. Article 36 does not create any enforceable individual "rights, privileges, or immunities" that can be vindicated under 42 U.S.C. § 1983.

The Supreme Court held in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), that only "an unambiguously conferred right [will] support a cause of action brought under § 1983." *Id.* at 283. Even where Congress legislates for the benefit of an identified class, the statute cannot be the basis for a private claim under 42 U.S.C. § 1983 unless Congress clearly intended for it to create individually enforceable federal rights. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120-122 (2005); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-284 (2002). This inquiry whether federal law creates enforceable private rights should be guided by the analysis whether the law creates an implied right of action. *See Gonzaga Univ.*, 536 U.S. at 284.

Article 36 of the Convention was not intended to establish any enforceable private rights. The United States explained in its initial brief in support or rehearing or rehearing en banc that the text, history, and implementation of the Convention show that it was not intended to create any private rights of enforcement. That same evidence is equally applicable to show that the Convention does not confer private "rights, privileges, or immunities" within the meaning of 42 U.S.C. § 1983.

Thus, the text of the Convention explicitly provides that the privileges and immunities it confers are "*not to benefit individuals*." Vienna Convention, preamble (emphasis added). The drafters of the Convention also drafted an Optional Protocol with carefully tailored and purely voluntary remedies, to be invoked only by States — which is inconsistent with any intent to create freestanding individual rights enforceable under § 1983. *Cf. Abrams*, 544 U.S. at 121-123.

Furthermore, and as we noted in our initial brief (at pp. 8-9), any "rights" that a foreign national might have under the Convention are derivative of, and in aid of, the "rights" of the foreign nation and its consular officials to carry on consular relations. Yet the foreign nation and its consular official cannot sue directly under the Vienna Convention to remedy an alleged violation, nor can they bring an action under 42 U.S.C. § 1983 for damages and injunctive relief. *See Breard v. Greene*, 523 U.S. 371, 378 (1998). It follows that an individual alien should not be able to do so either.

The plaintiff relies heavily on the text of Article 36 providing that rights of consular access "shall be exercised in conformity with [domestic law], subject to the proviso * * * that [domestic law] must enable full effect to be given to the purposes for which the rights * * * are intended." *See* Pl. Suppl. Br. at 4. That text, however, does not manifest any intent to create a private remedy or privately enforceable rights. The provision refers to how rights "shall be *exercised*" — *i.e.*, how rights will

be implemented in practice in situations where they apply, such as how and when detainees will be notified of the right to contact a consular representative, how consular officers will be informed if the detainee requests ("exercises" his right), and how consular officers can exercise the right of visitation. The means by which any rights will be "exercised" under the Convention does not speak to the available *remedies* where those rights are violated or not afforded. If a person sues for damages against a police officer who has violated his First Amendment rights, the person is not exercising his First Amendment right when bringing the lawsuit; he is suing for damages to remedy a prior interference with the exercise of his rights. Notably, the Supreme Court in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), rejected the argument that this provision barred the application of procedural default rules. *Id.* at 2681. The Court also expressed doubt that the Convention requires a "judicial remedy of *some* kind," and noted that "diplomatic avenues" were the "primary means of enforcing the Convention." *Id.* at 2680-2682.[2]

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[2] Indeed, even Justice Breyer's dissent in *Sanchez-Llamas*, which concluded that a criminal defendant could invoke the Vienna Convention in "legal proceedings that might have been brought irrespective of the Vienna Convention claim," *i.e.*, "an ordinary criminal appeal and an ordinary postconviction proceeding," did not decide the question whether the Convention creates "a private right that would allow an individual to bring a lawsuit for enforcement of the Convention or for damages based on its violation." 126 S. Ct. at 2694. Thus, even if the Convention may provide a rule of decision in a case that the alien could have brought in the absence of the Convention, it does not follow that the Convention creates a private right that can

(continued...)

The drafting history of Article 36 of the Vienna Convention also supports the conclusion that it does not create enforceable private rights. The Vienna Convention was drafted by the International Law Commission, the members of which recognized that the proposed article on consular notification "related to the basic function of the consul to protect his nationals vis-a-vis the local authorities," and that "[t]o regard the question as one involving primarily human rights or the status of aliens would be to confuse the issue." International Law Commission, Summary Records of 535th Meeting, U.N. Doc. A/CN.4/SR.535, at 48-49 (1960) (Sir Maurice Fitzgerald). Significantly, the ILC drafters also observed that the consular notification provision would be subject to the "normal rule" of enforcement under which a country that "did not carry out a provision" of the Convention would "be estopped from invoking that provision against other participating countries." *Id.* at 49.

The final ILC draft submitted to the United Nations Conference did not require law enforcement officials to notify detained foreign nationals that they could contact a consular representative, but instead required law enforcement officials to notify consular representatives whenever a foreign national was detained. *See* International Law Commission, Draft Articles on Consular Relations, With Commentaries 112 (1961), available at http://untreaty.un.org/ilc/texts/9_2.htm. Following numerous

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[2](...continued)
itself be the basis for a suit for damages.

delegates' expression of concern that requiring mandatory notice would impose a significant burden on receiving States, particularly those with large tourist or immigrant populations, *see* 1 Official Records, United Nations Conference on Consular Relations, Vienna, 4 Mar. - 22 Apr. 1963, at 36-38, 82-83, 81-86, 336-340 (1963), the Conference adopted a compromise proposal that required notice to consular representatives at the foreign detainee's request. *Id.* at 82. The purpose of the change was not to enshrine in the Convention an individual right for the detainee, but "to lessen the burden on the authorities of receiving States." *Id.* Given the circumstances in which it was added and the stated purpose for its inclusion, the notification provision cannot reasonably be interpreted to create enforceable private rights.

The history of the Vienna Convention's consideration and ratification by the United States Senate and its post-ratification implementation by the Executive Branch provide further evidence that the Convention does not create new private rights within our domestic legal system. The only inference that can be drawn from that history is that the Convention was understood to be "self-executing," *i.e.*, to impose legal obligations on U.S. officials without the need for further implementing legislation. As with federal legislation, the fact the Convention imposes a legal constraint on official conduct does not establish that it creates "rights" within the meaning of 42 U.S.C. § 1983. *See Gonzaga Univ.*, 536 U.S. at 283-284; *see also*

Restatement (3d) of Foreign Relations Law of United States § 111, cmt. h (1987) (noting that whether a treaty is "self-executing" is different from whether treaty creates enforceable private rights).

At the time of ratification, the State Department and the Senate Foreign Relations Committee agreed that the Vienna Convention would not modify existing law. *See* S. Exec. Rep. No. 9, 91st Cong., 1st Sess., at 2, 18 (1969). The State Department also noted that disputes under the Vienna Convention "would probably be resolved through diplomatic channels" or, "[f]ailing resolution," potentially through the processes set out in the Optional Protocol. *Id.* at 19.[3] And the Executive Branch has long construed Article 36 of the Vienna Convention not to create private rights enforceable in habeas corpus or other actions brought by private individuals and foreign governmental officials. *See, e.g.,* Brief for United States at 11-30, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (Nos. 05-51, 04-10566); Brief for United States at 18-30, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928); Brief for United States at 18-23, *Republic of Paraguay v. Gilmore*, 523 U.S. 1068

[3] Consistent with that view, the State Department's practice since ratification of the Vienna Convention has been to respond to foreign States' complaints about violations of Article 36's notification requirements by investigating those complaints and, where a violation has occurred, making a formal apology to that country's government and taking steps to lessen the likelihood of a recurrence of the problem. *See* Oct. 15, 1999, Letter from Department of State to Department of Justice in reference to *United States v. Nai Fook Li*, at A-3.

(1998) (No. 97-1390), and *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-8214). The Executive's longstanding interpretation of the Convention not to create private rights "is entitled to great weight." *United States v. Stuart*, 489 U.S. 353, 369 (1989) (citation and quotation marks omitted).

Finally, the fact that the rights asserted in this case are based on an international treaty, rather than a federal statute, should make the Court particularly reluctant to construe Article 36 of the Vienna Convention to create private rights enforceable under 42 U.S.C. § 1983. As the United States explained in our initial amicus brief, a treaty is entered into by the Executive and ratified by the Senate against the background understanding that it will not be privately enforceable. Additionally, international treaties are not the product of bicameral legislation, and private rights enforceable under 42 U.S.C. § 1983 must typically be created by Congress. *See Save Our Valley v. Sound Transit*, 335 F.3d 932, 937-938 (9th Cir. 2003). We are not aware of a single instance in which a federal court of appeals has recognized as valid a claim under 42 U.S.C. § 1983 seeking to enforce an international treaty. Given the absence of clear evidence that Article 36 the Convention was intended to create private rights that would be enforceable under 42 U.S.C. § 1983, this Court should decline to recognize such a claim.

B. In addition to failing to create any enforceable private rights, Article 36 of the Vienna Convention is not within the "Constitution and laws" that can secure

rights, the deprivation of which are cognizable under 42 U.S.C. § 1983. At best, the textual reference to "laws" is ambiguous about whether it includes international treaties, and the available evidence of Congress' intent as well as general interpretive principles weigh heavily against that construction of the statute.[4]

Section 1983 derives from § 1 of the Ku Klux Klan Act of 1871, establishing and conferring federal jurisdiction over a private right of action to vindicate the deprivation, under color of state law, of "any rights, privileges, or immunities secured by the Constitution of the United States." Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13. In 1874, following a multi-year effort to "simplify, organize, and consolidate all federal statutes of a general and permanent nature," Congress enacted the Revised Statutes of 1874. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 624 (1979) (Powell, J., concurring). In relevant part, the revised statutes divided the original provision of the 1871 Act into one remedial section and two jurisdictional sections. *See Maine v. Thiboutot*, 448 U.S. 1, 6-7 (1980); *Chapman*, 441 U.S. at 627-628.

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[4] As we next explain, the conclusion that the phrase "Constitution and Laws" as used in 42 U.S.C. § 1983 does not include treaties is based on the specific text, history, and context of Section 1 of the Ku Klux Klan Act of 1871, now codified in relevant part at 42 U.S.C. § 1983. This analysis does not imply that the Executive Branch generally construes the term "laws" to exclude treaties. In some contexts, Congress' use of the word can reasonably be interpreted to encompass treaties.

The remedial provision enacted as part of the Revised Statutes in 1874, and now codified at 42 U.S.C. § 1983, created a private right of action for the deprivation of "any rights, privileges, or immunities secured by the Constitution and laws." *See Maine*, 448 U.S. at 6-7 (describing history); *Chapman*, 441 U.S. at 624. The Supreme Court has recognized that, notwithstanding statements in the legislative history that the adoption of the revised statutes was not intended to make substantive changes, the inclusion of "and laws" broadened the right of action created by that provision to include claims seeking to vindicate certain individual rights protected by federal statutes. *See Maine*, 448 U.S. at 4-5; *cf. Chapman*, 441 U.S. at 625-626, 627-644 (Powell, J., concurring) (describing legislative history supporting conclusion that revision was not intended "to alter the content of federal statutory law").

There is no indication, however, that in enacting the revised statutes *in toto* in 1874 Congress intended to create a new private remedy for treaty violations (which, as we have explained, do not generally afford judicially enforceable private rights). The plain language of the provision — which refers to the vindication of rights protected by "the Constitution and laws," rather than by the "Constitution, the Laws of the United States, and Treaties," U.S. Const., art. III, § 2 — does not suggested that it was intended to encompass claims arising under international treaties. Nor does the underlying purpose for the provision: Congress' "prime focus" in enacting the Ku Klux Klan Act and other Reconstruction-era civil rights laws was to "ensur[e] a right

of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto." *Chapman*, 441 U.S. at 611. The Supreme Court cautioned in *Chapman* that a court should be "hesitant," in interpreting the jurisdictional provisions that were adopted as part of the statutory codification of the Ku Klux Klan Act, to construe them to encompass "new claims which do not clearly fit within the terms of the statute." *Id.* at 612. That concern is particularly acute in the context of recognizing a private right of action to enforce a provision of an international treaty.

Other historical evidence supports the conclusion that the term "laws" in 42 U.S.C.§ 1983 was not intended to refer to an international treaty such as the Vienna Convention. Just one year after enacting the revised statutes incorporating that term, Congress enacted a statute giving circuit courts original jurisdiction in certain categories of cases, including civil claims above the jurisdictional amount and "arising under the Constitution or laws of the United States, or treaties made." Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. The clear implication is that the term "laws" as used in both statutes does not include treaties or international agreements.

Similarly, the Habeas Corpus Act of 1867 extended the federal habeas power to "all cases where any person may be restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. Once again, the distinction between the language of the habeas

statute and of § 1983 supports the conclusion that "laws" and "treaties" are different things for purposes of § 1983. The distinction between the two provisions also supports the notion that Congress might have intended to provide for judicial review, through the specific equitable remedy of habeas corpus, of confinement alleged to be in violation of a treaty (assuming that the treaty created enforceable individual rights), but not to provide the full panoply of equitable and legal relief under § 1983 for any treaty violation, no matter how minor the resulting harm.

In contrast to these broadly-worded statutory provisions, the provision of the 1874 revised statutes that codified the jurisdictional grant to district courts in § 1 of the Ku Klux Klan Act (now codified at 28 U.S.C. § 1343(a)(3)), conferred jurisdiction over civil actions to redress the deprivation of rights secured "by the Constitution of the United States, or * * * by any law providing for equal rights * * *." *See Thiboutot*, 448 U.S. at 15-16 (describing history). Although the Supreme Court has acknowledged that this provision is narrower than a plain-language reading of § 1983, *see id.* at 20-21, Congress' use of this construction in the jurisdictional provision weighs against reading the parallel remedial provision in 42 U.S.C. § 1983 to have a wholly different, and significantly broader, scope, that does *not* follow from a plain-language reading of the phrase "and laws."

These historic provisions have been repeatedly amended and recodified in the 130-plus years since their original enactment, yet Congress has chosen not to change

the differences in wording among the various statutes. Both the general federal-question statute, 28 U.S.C. § 1331, and the federal habeas statute, 28 U.S.C. § 2241, continue to include the "Constitution," "laws," and "treaties" as among the sources of rights that can be invoked under those provisions. In contrast, 42 U.S.C. § 1983 continues to refer only to rights secured by the "Constitution and laws." This Court should decline to read 42 U.S.C. § 1983 so as to render those textual differences a nullity. *See, e.g., T.D. v. LaGrange School Dist. No. 102*, 349 F.3d 469, 475 (7th Cir. 2003) (noting that legal term used in several federal statutes should, absent strong evidence to contrary, be given consistent interpretation).[5]

The Supreme Court has not addressed the question whether an international treaty is one of the "laws" that secures rights that can be vindicated under § 1983. However, the Court has rejected an expansive interpretation of the statute, describing the cause of action created as vindicating rights under "the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 145 n.3 (1979). Consistent with this construction, the Supreme Court has held that § 1983

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[5] Furthermore, decisions interpreting and applying the federal habeas statute have held that only treaties conferring enforceable individual rights fall within the scope of the statute. *See, e.g., Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005), *rev'd on other grounds*, 126 S. Ct. 2749 (2006); *Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003). There certainly would be no basis for reading § 1983 more broadly, to permit a cause of action to enforce a treaty provision that was not intended to create a privately enforceable right.

does not encompass claims arising under common or "general" law, *see Bowman v. Chicago N.W. Ry. Co.*, 115 U.S. 611 (1885), or claims arising out of rights or privileges claimed under state law. *See Baker*, 443 U.S. at 142-144; *Carter v. Greenhow*, 114 U.S. 317 (1885).[6]

Indeed, even in the context of treaties between the United States Government and Indian tribes, the Ninth Circuit has questioned whether claims seeking to vindicate rights to tribal self-government and to take fish are cognizable under 42

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[6] In *Baldwin v. Franks*, 120 U.S. 678 (1887), the Supreme Court held that the forcible removal of Chinese nationals from their homes and businesses in violation of a treaty between the United States and China did not constitute a crime under federal statutes prohibiting conspiracies to forcibly "prevent, hinder, or delay the execution of any law of the United States," Rev. Stat. 5336, and "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States," Rev. Stat. 5508. *Id.* at 662-663, 693-694. In reaching that conclusion, the Court assumed that the treaty could constitute a "law" within the meaning of the statutes, *id.* at 693-694, 661-662 — a point that the petitioner had not challenged in his brief to the Court. *See Baldwin v. Franks*, 120 U.S. 678, Brief of Petitioner in Error, in Transcript of Record (filed Apr. 18, 1886). The Court's assumption that the term "laws" as used in certain criminal civil-rights statutes included treaties, which was made under different operative statutes and without an analysis of their text and history, does not support an interpretation of the unexplained addition of the term "and laws" in the *civil* remedy under § 1983 to encompass violations of international treaties. In the criminal context, the exercise of prosecutorial discretion can safeguard against harmful applications of the statute, such as an application that would cause harm to our foreign relations or interfere with the State Department's implementation of treaty obligations. The private civil remedy created by 42 U.S.C. § 1983, in contrast, contains no such safeguard — weighing against a broad construction of the statutory cause of action it creates. *Cf. Central Bank v. First Interstate Bank*, 511 U.S. 164, 190-191 (1994) (refusing to interpret criminal aiding-and-abetting liability as evidence of Congress' intent to impose civil aiding-and-abetting liability).

U.S.C. § 1983, because they are "grounded in treaties, as opposed to specific federal statutes or the Constitution." *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 662 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990). Even if treaties with Indian tribes were encompassed by § 1983's reference to "laws," furthermore, that would not mean that Congress intended for international treaties to be covered by the statute. The United States Government has a "unique obligation toward the Indians", *Morton v. Mancari*, 417 U.S. 535, 555 (1974), which warrants in some circumstances more favorable treatment than is afforded to others. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-676 (1979); *State of Minnesota v. Hitchcock*, 185 U.S. 373, 396 (1902). Furthermore, the Supreme Court has recognized that Indians have a federal common-law right to sue to vindicate aboriginal rights, which dates back to the adoption of the Constitution. *See Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 234-236 (1985). And Indian tribes, as dependent sovereigns, have no recourse against the United States under public international law or through diplomatic means to redress violations of Indian treaties.

International treaties, in contrast, are adopted with a background presumption that violations will be "the subject of international negotiations and reclamation," not judicial redress. *Head Money Cases*, 112 U.S. 580, 598 (1884). This presumption against individual judicial enforcement protects the prerogatives of the Executive in

the conduct of foreign affairs. As the Supreme Court explained in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004), the potential foreign-policy implications of permitting private rights of action to enforce international law "should make courts particularly wary" of recognizing claims of this sort. *Cf. Gonzaga Univ.*, 536 U.S. at 291 (Breyer, J., concurring) (noting that no "single legal formula" can govern "ultimate question" whether Congress intended for private individuals to have cause of action under § 1983).

It seems particularly implausible that Congress would have intended to include international treaties within the "laws" enforceable in a private damages suit under 42 U.S.C. § 1983, because that would have had the effect of giving foreign nationals greater rights under treaties to which the United States is a party than are conferred upon United States citizens. This Court should be reluctant in the absence of clear Congressional intent "to impose judicially such a drastic remedy, not imposed by any other signatory to this convention," and thus to "promote disharmony in the interpretation of an international agreement." *United States v. Chaparro-Alcantara*, 226 F.3d 616, 622 (7th Cir.), *cert. denied*, 531 U.S. 1026 (2000); *see also* Restatement (3d) of Foreign Relations Law of United States § 325, cmt. d (1987).

Finally, even if some treaties could fall within the "laws" that create rights enforceable under 42 U.S.C. § 1983, this Court should decline to recognize such a cause of action to enforce Article 36 of the Vienna convention. Where Congress

creates a specific statutory remedy for the vindication of a federal right, that is "ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." *Abrams*, 544 U.S. at 121. A court should be particularly willing to find displacement of a § 1983 remedy in the area of foreign affairs. *Cf. Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942) (recognizing that courts are more likely to find federal preemption when Congress legislates "in a field that touche[s] international relations" than in area of traditional police power); *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981) (recognizing President's authority to renounce or extinguish claims of U.S. nationals against foreign governments). Here, the existence of explicit government-to-government remedies under the Optional Protocol should bar recognition of a suit under § 1983.

CONCLUSION

For the foregoing reasons, this Court should vacate the panel decision in this case and grant rehearing or rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared with Word Perfect 12 in a proportional typeface with 14 characters per inch in Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Supplemental Brief Of The United States As Amicus Curiae In Support Of Petition For Rehearing Or Rehearing En Banc were served on October 5, 2006, by electronic delivery and by overnight delivery, postage prepaid, to the following counsel:

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